## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### Opinion Below.

The opinion of the Supreme Court of the State of Illinois is included in the Record in this case and is reported in 375 Illinois 627.

### Jurisdiction.

The reasons for the jurisdiction of this Court are set forth in the Petition for Certiorari herein before set out. The decision in the Illinois Supreme Court was entered on February 18, 1941. There was no rehearing.

### Statement of the Case.

All the facts are sufficiently stated in the petition, to which reference is made.

### Specification of Errors.

1. The Supreme Court of the State of Illinois erred in not finding that the application of the statute involved herein and being Section 86A of an act concerning local improvements of the State of Illinois violates the Constitution of the United States of America in that it impairs the obligation of contract and deprives the objector of his property without due process of law.

2. The Supreme Court of the State of Illinois erred in not finding that Section 86A is unconstitutional and void because it sets up an unreasonable and arbitrary classifica-

tion and thereby denies to the objector the equal protection of the laws of the State of Illinois.

3. The Supreme Court of the State of Illinois erred in not reversing the decision of the County Court of Cook County and dismissing the petition of the Village of Bellwood for extension and refunding under Section 86A.

## Summary of Argument.

The summary of argument is set up in the index to the petition on the first page thereof.

## BRIEF.

### I.

**The 1933 amendment adding Section 86A to the Local Improvement Act impairs the obligation of contract and deprives bondholders of property without due process of law as it is applied to the case at bar.**

*Friedman* v. *City of Chicago* (374 Ill. 545).

*Village of Downers Grove* v. *Harley,* 372 Ill. 586 (1940).

*Scribner* v. *Village of Downers Grove,* 372 Ill. 614 (1940).

*Worthen Co.* v. *Kavanagh,* 295 U. S. 56, 79 L. ed. 1298.

### II.

**Section 86A of the Local Improvement Act is unconstitutional and void because it sets up unreasonable and arbitrary classifications and so deprives Objector of equal protection of the laws.**

*The Sturges & Burn Manufacturing Co.* v. *Pastel,* 301 Ill. 253.

*The People* v. *Jacob Seemann,* 302 Ill. 538.

*The Michigan Millers Mutual Fire Insurance Co.* v. *McDonough,* 358 Ill. 575.

*Binney* v. *Long,* 299 U. S. 280.

## ARGUMENT.

### I.

**The 1933 amendment adding Section 86A to the Local Improvement Act impairs the obligation of contract and deprives bondholders of property without due process of law as it is applied to the case at bar.**

The bonds issued to anticipate the collection of Bellwood Special Assessment 100 were issued in 1928. The bonds issued to anticipate the collection of the four other special assessments levied against the property were issued in 1928 or in earlier years. At the time all these bonds were issued no Statute existed in the State of Illinois permitting an extension of delinquent special assessment installments and a refunding of the special assessment securities issued to anticipate collection of the same. No bondholder or any group of hondholders had a right to come into the County Court and apply for extension of the installments and refunding of securities, replacing his bond with one of current date. If any enforcement proceedings to collect the special assessment installments such as foreclosure proceedings were instituted all delinquent special assessments of all the various warrant numbers due against a given piece of real estate could be foreclosed at the same time and a foreclosure sale if held would liquidate equally the liens of all of the different special assessments. In 1933 the legislature enacted Section 86A which seeks to give the right of extension of installments and refunding of securities to bondholders whether their bonds were issued prior to the effective date of the act or thereafter. In other words the Statute is retroactive. It has been held that

although the legislature may make a legislative enactment retroactive in its operation where the Statute expressly so indicates, still if the enactment seeks to confer any new rights or privileges upon any one class to the prejudice and detriment of another the enactment is unconstitutional as depriving such person of his property without due process of law and as impairing the obligation of contract.

In the case at bar the question then arises does Section 86A confer upon one class of bondholders any new rights to the detriment or prejudice of any other group of bondholders? The appellant respectfully submits to this Honorable Court that Section 86A does confer some new rights upon one group of bondholders to the positive detriment and to the impairment of obligation of the other groups of bondholders where there are numerous installments of several different special assessments due upon the same lot or group of lots and where by reason of concentrated holdings, only one special assessment is extended and its securities refunded. In the present case the facts show that the land involved is vacant and unimproved and that the special assessment installments delinquent and unpaid against the land are approximately double its present fair market value. It is very obvious, therefore, that the only manner in which such lots can be marketed and unfrozen would be through a wholesale liquidation proceeding involving taxes and special assessments due thereon. If it is permissible to extend the installments of only one assessment and refund the securities due thereon it places the bondholders under said extended assessment in a prior and preferred position with rights superior to the rights of the bondholders under the other and unextended and unrefunded special assessments. It makes their obligations pending, current obligations, as against the status of the others which are past due and delinquent. In the event of any liquidation proceeding such as a tax foreclosure which,

by nature of the circumstances involved in this case, is inevitable, extension under Section 86A makes it possible for the bondholders under Bellwood Special Assessment Number 100 to have a foreclosure sale which would completely liquidate the liens of all the other four special assessments due against the same property, leaving this property subject only to future installments of Bellwood Special Assessment Number 100. Such a liquidation would mean undoubtedly that bondholders under Special Assessment Number 100 would receive full payment of all installments of that special assessment not yet due at the time foreclosure was instituted. On the other hand, holders of bonds under the other four special assessment numbers would be affected most disastrously. In the first place a foreclosure sale would liquidate their liens completely; secondly, the proceeds of sale would be spread proportionately to all installments of all special assessments in the action so that even if the full value of the property were bid at the foreclosure sale each bondholder would receive only a fraction on the face amount of his bond in the liquidation. However, the sale being necessarily subject to future installments of Bellwood Special Assessment Number 100 as extended, the proceeds of sale would be considerably less than the fair cash market value of the real estate sold.

In fact, if the inevitable liquidation through foreclosure should come within the first one or two years following extension and refunding, if allowed, of Bellwood Special Assessment Number 100 it is very obvious from the facts and figures testified to in the lower court that the return to the bondholders under the unextended special assessments would be less than one cent per dollar on the par value of the bonds whereas the return on bonds of the Bellwood Special Assessment Number 100 as extended would be 80 or 90 cents per dollar par value.

If Section 86A is construed to permit an extension which so changes the comparative positions of the bondholders under the various special assessment installments due on a given group of lots, Section 86A gravely violates the constitutional rights of all persons who hold special assessment bonds payable out of the unextended special assessment installments, and makes their obligations in effect a second lien, reduces severely the amount which they can realize from the real estate subject to the several installments of their special assessment and thus deprive them of property without due process of law and impairs the obligation of their contracts, clearly in violation of Sections 2 and 14 of Article 2 of the Constitution of the State of Illinois and of Section 10 of Article 10 thereof and the 14th Amendment to the Constitution of the United States of America.

At the time the Municipality issued the bonds involved herein no provision whatsoever existed in the Statutes for extension and refunding. It was therefore immaterial to the purchaser whether he bought single bonds in scattered issues or whether he bought all of the bonds of an issue or of a maturity thereof. Had this statutory provision for refunding been in existence at that time it would be much more advantageous to purchase these bonds in blocks composed of one or more whole maturities, if the purchaser were to protect himself against the contingency of having other special assessments covering the same property, through such refunding, and foreclosure, endanger the primary security behind his bonds. With the passage of the refunding statute and the attempt to refund and extend Bellwood Special Assessment Number 100, the bondholders under other special assessments on this same property and in particular the Objector in this case, *find themselves facing a set of conditions which were not possible under the law when their bonds were issued* and so

now find themselves with the obligations and covenants on which they relied at the time of purchase, altered and the rights under their contract dangerously impaired.

The case of *Friedman* v. *City of Chicago* (374 Ill. 545) involved an amendment passed in 1939 to the Local Improvement Act. The court held in that case that if an amendment to the Statute, passed after the date of the issuance of special assessment bonds, creates new and additional rights which makes it possible for any bondholders or group of bondholders to prejudice or detrimentally affect in any way the rights of other special assessment bondholders, that such Statute would be unconstitutional and void. Applying the law in the *Friedman* case to the case at bar it is clear that where a retroactive statute makes it possible to extend one of several special assessments, making its installments a current and prior lien and where, by reason of the restrictive provisions of the refunding act any holder of a single bond is refused access to the privilege of its provisions and is unable to have his bond refunded, the retroactive statute permitting extension creates an arbitrary discrimination, not before existing, and hence violates the constitutional prohibition on taking property without due process and impairs the obligation of contract. Such statute must therefore be held unconstitutional and void.

In the cases of *Scribner* v. *Village of Downers Grove,* 372 Ill. 614 and *Village of Downers Grove* v. *Harley,* 372 Ill. 586, the court held that an order under Section 86A of the Local Improvement Act, the section involved herein, cannot be entered if the order prejudicially affects in any way the vested rights of other bondholders. In the *Harley* case on page 589 the court says:

> "* * * section 86a, *supra,* must be construed so that the refunding of part of the installments will not be made in such a manner as to deprive any bondholder

of a vested right. It seems reasonably clear that it was the intention of the legislature in the enactment of section 86a of the Local Improvement Act to authorize all or part of the installments of a special assessment to be refunded, *provided that all the remaining bonds have been paid or not prejudicially affected in any way by the refunding of a part of the installments.*" (Italics ours.)

The *Harley* case involved a proceeding to extend six of the installments of a given special assessment leaving four other installments unextended. The situation is directly analogous to the present case where all of the installments of Special Assessment Number 100 are sought to be extended, leaving four other special assessments unpaid and unextended.

The case of *Scribner* v. *Village of Downers Grove, supra,* was, like the *Harley* case, a proceeding to extend certain installments of a certain special assessment leaving other installments unextended. In discussing the question of whether or not Section 86A was only a remedial act and was therefore not subject to the charge of unconstitutionality on the grounds that it did not impair substantive rights of bondholders but only the remedy the court held the act to be analogous to an act passed by the State of Arkansas which the United States Supreme Court held unconstitutional on the ground that the change of remedy under the Statutes involved so vitally affected the rights of the parties that the change in remedy could be considered an impairment of the substantive rights of the parties and the Statute was therefore unconstitutional. The court also says in reference to Section 86A in the *Scribner* case at page 621:

"It is evident that the legislature did not intend to confer upon the village power to refund these install-

ments in such a manner as to deprive any bondholder of his vested rights."

Appellant respectfully submits that in this case to permit the extension of Bellwood Special Assessment Number 100 does vitally affect the vested rights of the bondholders under the unextended special assessments for the reasons hereinabove shown; that therefore the words of the court in the *Harley* and *Scribner* cases, *supra*, hereinabove quoted should be applied to the case at bar and the Section 86A of the Local Improvement Act held invalid.

The Supreme Court of the United States also affirms this doctrine in the case of *W. B. Worthen Company, Trustee* v. *Kavanagh, Trustee,* reported in 295 U. S. 56 in the year 1935. The facts in this case were as follows: In 1930 bonds secured by benefit assessments levied against real estate were issued by the assessment trustees under the Statute as then existing of the State of Arkansas. The Statutes in 1930 provided for prompt foreclosure in the event of default on the bonds and outlined the method and procedure in such foreclosure. In March of 1933 the legislature of the State of Arkansas enacted three statutes radically changing the foreclosure procedure, lengthening the time involved therein, decreasing the amount chargeable for expenditure and in several other ways impeding the speedy realization on the security in the event of a default in the payment of the bonds. Certain bonds being in default a foreclosure was instituted by a Trustee and some of the bondholders under the old act. A foreclosure decree was entered under the terms of the new act and the plaintiffs appealed challenging the constitutionality of the new acts and alleging they were entitled to foreclosure under the Statutes as they existed at the time the bonds were issued. The Supreme Court of the United States upheld this contention, held the Statutes unconstitutional as impairing obligation of

contract and ruled that plaintiffs were entitled to foreclosure under the Statutes as they existed at the time the bonds were issued. The court said, "at the execution of the bonds and mortgages the Statutes of Arkansas contained provisions well planned to make these benefit assessments acceptable security," and goes on to say later in the opinion that "Not even changes in remedy may be pressed so far as to cut down security of a mortgage without moderation or reason or in a spirit of oppression. Even when public welfare is invoked as an excuse such bounds must be respected." The court went on to say that the 1933 enactments so restricted the terms of foreclosure that "active bidding at the sale is made virtually impossible."

The case is directly analogous to this one. At the time of the execution of the bonds in question the Statutes of Illinois contained no provisions which would render bonds sold individually or in small blocks as questionable security whereas the Statute later enacted puts such bonds at such a disadvantageous position that they become, under such Statute, very questionable security. In the event of a foreclosure of the special assessment liens the changes in the Statutes caused by the enactment of Section 86A would cause such conditions that, just as in the *Worthen* case, "active bidding at the sale is made virtually impossible."

## II.

**Section 86A of the Local Improvement Act is unconstitutional and void because it sets up unreasonable and arbitrary classifications and so deprives Objector of equal protection of the laws.**

The 14th Amendment to the Federal Constitution prohibits any state from denying to any person the equal protection of the laws. Section 22 of Article 4 of the Con-

stitution of the State of Illinois prohibits the passage of special legislation or granting special privilege to any person. It has been repeatedly held by this court that where a Statute sets up an unreasonable and arbitrary classification, it will be held unconstitutional; that all classifications must be based on a real and substantial difference having a rational relation to the subject matter of the legislation. Section 86A hereinabove set forth provides in part:

> "Any municipality that has issued securities . . . shall upon petition of *Seventy-five per cent of the holders* of any securities issued against any assessment or any installment or installments thereof addressed to the corporate authorities of such municipality, adopt an ordinance directing and providing for the extension of the time of payment of the assignment or any of the installments thereof . . ." (Italics ours.)

To require a majority of 75% of the holders of outstanding securities to join together in a petition to the Municipality as a condition precedent to extension and refunding is an arbitrary, unreasonable and discriminatory exercise of legislative power. In the case at bar the evidence shows that the holdings of Special Assessment Number 100 are concentrated in one owner and that the ownership of some of the other special assessments due upon the same property is scattered. Under the Statute involved herein holders of other special assessment bonds may not even commence proceedings for extension and refunding unless three-fourths of them will join together at the very start and petition the Village for the same. This is obviously unfair to the Objector herein and to all other bondholders under the other unextended special assessments and deprives them, as a practical matter, of any possibility of making equal use of the same statute in effecting an exten-

sion and refunding so that they might establish their bonds on an equal position with the bonds of Special Assessment Number 100 as extended and refunded.

There is no reasonable and logical basis to assume that in order to complete an extension it should be necessary to commence with 75% of the outstanding bonds. There are many instances where bondholders will refuse to initiate any action on the grounds that it might subject them to burdens of time and expense, whereas if the extension proceeding could be commenced by one or a few of the scattered bondholders, and the only thing remaining for other bondholders to do would be to deposit their bonds in some depository named by the court for the purpose of exchanging them for new and current obligations, this proceeding might be successfully followed in innumerable special assessments. In the case of *Michigan Millers Mutual Fire Insurance Company* v. *McDonough*, 358 Ill. 575, the court held a certain section of the Fire Marine and Inland Navigation Insurance Act invalid as unlawfully discriminating against foreign insurance companies and says at Page 585:

> "To avoid falling within the constitutional inhibition of special legislation the classification of subjects or objects must be based upon some reasonable and substantial difference in kind, situation or circumstance bearing a proper relation to the purposes to be attained by the Statute."

In the case of *People* v. *Seemann*, reported in 302 Ill. 538, the court says at Page 547:

> "A distinction in legislation is not arbitrary if any set of facts can reasonably be supposed to sustain it, but it must rest upon a reasonable basis, and a classification is not valid which has no reasonable basis but is essentially arbitrary."

The Illinois Supreme Court affirmed the same principle again in the case of *Sturges and Burn Manufacturing Company* v. *Pastel,* 301 Ill. 253, where it held unconstitutional an Act of 1893 with reference to imprisonment of a defendant after jury trial and exempted from imprisonment defendants who defaulted, plead guilty or confessed judgment. The court ruled such a distinction an arbitrary discrimination between different classes of litigants and was a denial of the equal protection of the laws within the meaning of the Constitution of the United States and of the State of Illinois.

The Supreme Court of the United States also has affirmed this doctrine many times as in the case of *Binney* v. *Long,* 299 U. S. 280. In this case a succession tax law of the State of Massachusetts was held unconstitutional as repugnant to the equal protection clause of the Fourteenth Amendment of the Constitution of the United States for the reason that it selected an arbitrary date, to-wit: September 1, 1907 and provided that succession to property under conveyances made prior to that date were taxable and succession under conveyances thereafter were not. The succession tax law containing such provision was enacted in 1909.

Certainly such arbitrary classifications and discriminations are no more unreasonable than the provision of Section 86A which requires a petition of 75% of the bondholders before any steps can be taken for the extension and refunding of their special assessment bonds.

## CONCLUSION.

It is respectfully submitted that the County Court of Cook County erred in allowing the extension of special assessment number 100 of the Village of Bellwood and refunding the securities issued thereunder and in not finding that Section 86A deprived Objector without due process of law and impaired the obligation of the bonds owned by the Objector; and in not holding that Section 86A of the Local Improvement Act was unconstitutional and void, has deprived the Objector of the equal protection of the law and in denying that the petition of the Village of Bellwood for such extension and refunding; that the Supreme Court of the State of Illinois erred in affirming the decree of the County Court of Cook County and in not finding that Section 86A was unconstitutional and void; that Section 86A violates the Federal Constitution and as such should be held invalid and void.

It is, therefore, respectfully submitted that a Writ of Certiorari should issue in the above entitled cause to the Supreme Court of the State of Illinois.

Respectfully submitted,

JOHN F. VOIGT,
*Counsel for the Petitioner.*

MARSHALL S. HOWARD,
*Of Counsel.*

# APPENDIX.

## Text of Illinois Refunding Statute.

EXTENDING TIME FOR PAYMENTS OF ASSESSMENTS—REFUNDING BONDS.) 86a. The court having jurisdiction of the original assessment proceeding is hereby authorized at any time after the assessment has been confirmed to extend the time of the payment of assessments, or any installment or installments thereof, whether due or not due, heretofore or hereafter levied, and in case securities have been issued, to refund the securities and past due interest thereon, heretofore or hereafter issued in anticipation of the collection of the assessments or any installment thereof levied under the provisions of this Act, or any part thereof, and the past due interest thereon, (unless such past due interest be waived). In cases where no securities have been issued, the provisions of this section as to refunding securities shall not apply but the court shall, on petition of the municipality, have jurisdiction to extend the time of payment of the assessment. Securities not due may be refunded only when the holders thereof surrender the same in exchange for refunding securities issued in lieu thereof, or deposit the same as hereinafter provided and agree to accept payment therefor in cash in an amount not exceeding the par value thereof, together with accrued interest; said payment thereof is to be made out of the proceeds of the sale by the municipality of said refunding securities; provided that all the securities against any installment to be refunded shall be so surrendered or deposited. The court is hereby vested with authority to divide any assessment or any install-

ment or installments thereof into a greater number of installments than was originally provided for in the order confirming the assessment and to fix the amount of each installment, if, in its judgment, such re-division into a greater number of installments is for the best interest of all parties concerned. Whenever it is desired to extend the time of payment of any assessment or any of the installments thereof and issue refunding securities as in this Act provided any municipality that has issued securities in anticipation of the collection of special assessments levied under "An Act Concerning Local Improvements," approved June 14, 1897, as amended, shall, upon petition of seventy-five per cent of the holders of any securities issued against any assessment or any installment or installments thereof addressed to the corporate authorities of such municipality, adopt an ordinance directing and providing for the extension of the time of payment of the assessment or any of the installments thereof and the sale and exchange of refunding securities in anticipation of the collection of the special assessment or any of the installments thereof the time of payment of which is to be extended. The ordinance so adopted shall direct the filing of a petition in the court having jurisdiction of the original assessment. In the ordinance, the municipality shall establish a date of issue of such refunding securities and such date of issue shall be also the date from which interest on said refunding securities shall run and from which interest on the assessment so extended shall run. The ordinance for such refunding shall refer to the original assessment proceeding and no estimate or recommendation by the Board of Local Improvements shall be required. The court shall hear the proceeding in a summary manner without a jury and there shall be no hearing on benefits or on any legal objections not arising subse-

quent and incidental to the proceeding herein provided for. No judgment confirming any proceeding under this Act shall be entered until all outstanding securities shall have been either deposited in the court or with some depository under an escrow agreement approved by the court. The petition shall set forth the amount of the assessment or installments to be extended, the date or dates of confirmation of the original assessment, the rate of interest of the original assessment, the amount of cash on hand in the particular assessment or installments, the outstanding securities or other obligations to be refunded, the date of maturity of the outstanding securities and the rate of interest same bears. Such petition shall also state that the holders of the securities issued in anticipation of the collection of said assessment or installments, will surrender their securities in exchange for refunding securities to be issued under the provisions of this Act, or accept in payment thereof an amount not exceeding the par value thereof, with accrued interest thereon; and such petition shall also state what assessment or installments thereof are desired to be refunded, the desired maturity and the rate of interest of the extended installments, and the maturity, amount and rate of interest of the refunding securities sought to be issued. Accompanying such petition there shall be filed an assessment roll setting forth a description of the lots, blocks, tracts and parcels of land assessed in the original proceedings, the total amount of the unpaid installments, and the interest thereon proposed to be extended against each tract, the amount, number and due date of each installment of the proposed extended assessment. The judgment of the court confirming said refunding assessment shall be final and conclusive upon all parties and no appeal therefrom or writ of error thereto shall be collected in the same manner as the original assessment.

When said petition is filed the same shall be presented to the court and if found to be in proper form the court shall set the same for hearing at such date as will enable the clerk of the court to give at least ten (10) days notice of the hearing thereon, and it shall be the duty of the clerk to cause a notice to be published in some secular newspaper of general circulation within the County wherein the original assessment was confirmed. Said notice shall set forth the filing of the petition, the docket and warrant number of the assessment and the installment or installments thereof proposed to be extended and the number of installments in which it is proposed to divide the extended assessment. Said notice shall also state when and where the court will hear objections to such petition, the publication of which notice shall be at least ten (10) days prior to the date set for hearing, and the clerk shall also cause at least one copy of such notice to be posted in each of at least five (5) public places in the neighborhood of the improvement at least ten (10) days prior to the date set for such hearing. At such hearing the court may extend the time of payment of one or more installments of said assessment, change the number of installments in which said assessment or installments are divided, and subject to the provisions of this Act, provided for the details of the issuance of the refunding securities, in accordance with the prayer of the petition, and enter an order confirming the assessment as extended. Any property owner may pay the original assessment or any installments to be extended within ten (10) days after the entry of such order. Upon the expiration of ten (10) days after the entry of such order the municipal authorities shall issue the refunding securities authorized by order of court, provided the delivery of the refunding securities shall be simultaneous with the surrender of the securities to be refunded or paid. The securities so sur-

rendered shall be immediately cancelled. The collection and payment of the extended assessment(s) and the securities issued hereunder shall be in manner as now provided by law.

Assessments and installments, the time for the collection of which has been extended, shall continue to be a lien on the lands assessed the same as the original assessment and the refunding securities issued under the provisions of this Act shall be payable therefrom.

Whenever the refunding of securities and the extending of the time of payment of any assessments or installments thereof include assessments or installments past due and such assessments or installments or any part thereof have been returned delinquent, withdrawn or forfeited as provided by law, the court shall in and by the order extending the time of payment and authorizing the refunding of the securities, order the County Collector to withdraw said assessments or installments from the delinquent list and order the proper officers to release all property forfeited or withdrawn on account of said assessments or installments, time of payment of which is to be extended, by the proper entry upon the tax sale and judgment record of said county. The county clerk shall charge such security holders a fee of thirty-five cents (35¢) for each service rendered by him in connection therewith.

All reference herein to statutes affecting the original proceedings shall refer to such statutes as are now in force or as may hereinafter be enacted. The use of the word "securities" shall be held to include bonds, coupons and vouchers, public benefit vouchers and warrants and accrued interest.